IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO. 356 of 2007

IN

NOTICE OF MOTION NO.696 OF 2007

IN

SUIT NO. 2429 OF 1997

Lakhan C. Kanojia .. Appellant

versus

M/s.Jonson Engineering & Trading

Pvt.Ltd. & ors. .. Respondents

...

Mr.D.S. Chandnani for the appellant.

Ms.Sheetal Kumar i/b M.M. Patel & Co. for respondent no.1.

CORAM : R.M.S. KHANDEPARKAR

AND D.G.KARNIK, JJ

DATED : 18th April 2007.

P.C.:

1. Heard.

2. The appeal arises from order dated 28th March 2007 passed by the learned Single Judge in Notice of Motion no. 696 of 2007 in Suit no.2429 of 1997. Notice of Motion was taken out essentially for modifying the order dated 7th February 2000 passed in Notice of Motion no.2438 of 1997 and in Notice of Motion no.4321 of 1994 in Suit no.2429 of 1997 and Suit no.5584 of 1994 respectively.

3. Notice of Motion was taken out mainly on the ground that the said order of 7th February 2000 was obtained by playing a fraud upon the court by the plaintiff. The learned Single Judge on going through the records found the motion was totally ill-advised for more than one reason and therefore rejected the same by the impugned order. It has been also observed that the application was moved at the instance of the appellant on totally unsustainable plea.

4. In relation to the allegation of the fraud, learned advocate arguing the matter on behalf of the appellant sought to draw attention to paragraph no.4 and 5 of the order dated 7th February 2000. Both the

paragraphs read thus:-

> 4. In so far as Notice of Motion no.2438 of 1997 filed in Suit No. 2429 of 1997 is concerned, in that motion the relief claimed is for appointment of the Court Receiver on the ground floor flat and the garage, because possession of Kanojia of that flat and garage, is unauthorised and with him continuing in possession of the flat there is very likelihood of third party interest being created in that flat."
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> 5. I have heard the Counsel appearing for the Plaintiff also for the Defendants and the intervenors. In my opinion for considering the question whether the Court Receiver is to be appointed, the inquiry that this Court has to make is whether the possession of Kanojia of the flat at the present moment can be termed as an authorised possession on behalf of the tenant or it can be termed as unauthorised possession. In this regard it is to be noted that two positions are admitted between the parties, namely 1) that Kadambande was the original tenant and 2) that presently Kanojia of the matter, therefore, the question that arises for consideration is whether the possession of Kanojia of the flat can be termed as authorised possession, in what capacity he is occupying the flat. In so far as the original tenant Kadambande is concerned, she has in paragraph 5(c) of here affidavit stated that -
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> "Since last two years I have left the said premises in the hands of the said Kanojia completely and have gone to stay at 10, South Harsidhi, Opp. Urdu School, Indore. I however come to Bombay very often and whenever I come to Bombay I reside with the said Kanojia the Defendant no.7 in the said premises".

She has further stated in Paragraph 5(h) that -

> "I say that the said Kanojia the Defendant no.7 is like my son and he is the tenant and/or the sub-tenant in respect of the said premises. The Defendant no.6 knowing that I am residing at Indore wanted to oust the said Kanojia the Defendant No.7 and his family member from the said premises and has therefore obtained papers and documents as stated hereinabove from me by misguiding me and playing fraud upon me".

5. Plain reading of the above quoted paragraphs would disclose that the learned Single Judge while disposing of the notice of motion no.2438 of 1997 and 4321 of 1994 taking into consideration the stand taken by the original tenant that she had left the premises in the hands of Kanojia completely and had gone to stay at 10, South Harsidhi, Opp. Urdu School, Indore, had held that it being nobody's case that any sub-tenancy was created in favour of Kanojia prior to 1972 and no independent right in the suit flat having been claimed by Kanojia, the Notice of Motion for appointment of Court Receiver and direction to the Court Receiver to take physical possession of the flat was justified and was accordingly granted. Apparently, we find that on consideration of the facts established from the records obviously discloses total absence of any

fraud having been played upon the court by the plaintiff. Once the facts which were considered and recorded in the order are not in dispute, but merely the conclusions drawn based on those facts are sought to be disputed, it cannot lead to conclusion that there was any fraud being played by the party. The aggrieved party in such case may have right of appeal against such order. However, by no stretch of imagination, it can be said that there was any fraud being placed by the party. The entire Notice of Motion having been moved solely on the allegation of fraud having been played by the plaintiff in obtaining the said order as the appellant Kanojia failed to prove the same and on that count having been dismissed, there is absolutely no substance in the appeal, In fact, the appeal is absolutely waste of time of the court and therefore deserves to be dismissed with exemplary cost of Rs.25,000/-. The costs shall be paid within four weeks by the appellant and on deposit thereof, to be credited to the account of the Maharashtra Legal Aid Services Authority.

6. Appeal accordingly stands summarily dismissed.

(R.M.S. KHANDEPARKAR, J)

(D.G. KARNIK, J)